No. 12299.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, etc., *et al.*,

Defendants.

PAUL GAWZNER and IRENE GAWZNER,

Appellants and Cross-Appellees,

vs.

LEO LEBENBAUM,

Cross-Appellant and Appellee.

REPLY BRIEF FOR APPELLANTS PAUL GAWZNER AND IRENE GAWZNER.

HILL, MORGAN & FARRER, and
STANLEY S. BURRILL,
1007 Title Guarantee Building, Los Angeles 13,
Attorneys for Appellants Paul Gawzner and Irene Gawzner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Statement of the Case.

Gawzners are criticized for having omissions in their "Concise Abstract of Case" and for stating conclusions therein. It will be recalled that on page 15 of their Opening Brief Gawzners stated that they recognized the concise abstract did not include many of the side issues which arose. To have stated every position taken by the respective parties, including the United States, during the course of this litigation would have taken the space of the entire brief. We submit the Concise Abstract sets forth the essential facts and points involved. We shall, however, note the main criticisms.

1. **The Specific Provision for Replacement of Furniture, Furnishings and Personal Property to the Same Condition as at the Commencement of the Term Contained in Paragraph Seven of the Lease Controls the General Language of Paragraph Thirteen Relating to the Real Property.**

Gawzners are criticized for failing to note Paragraph Thirteen of the lease [R. 294]. It is fundamental that specific language in a document controls the general language.

12 *Am. Jur.* 778 and 779, Contracts, §§243, 244.

Paragraph Seven [R. 287] specifically refers to repair and replacement of furniture, furnishings and personal property. Paragraph Thirteen [R. 294] is titled "Waste," a term ordinarily applied to real property.

56 *Am. Jur.* 450, Waste, §§1 and 2;
67 *Corpus Juris* 610, Waste, §1.

A careful reading of the first paragraph of the Concise Statement (G.O.B. p. 3)* will disclose that the distinction was noted. It is submitted that the criticism has resulted either from a failure to read the Concise Statement with care or from a failure to examine the lease with care. Paragraph Thirteen does not *limit* Paragraph Seven. They cover different property. Seven covers *personal* property and is specific. Thirteen refers to *real* property and is general in its language. The District Court did not note this distinction [R. 178-179].

Reference is then made (L.A.B. 2) to the fact that the trial court found that the parties had in stipulating to the

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*References to Gawzners' Opening Brief will be noted "G.O.B."; Lebenbaum's Answering Brief as "L.A.B." Reference to the Transcript of Record will be made by the letter "R." followed by the page referred to. All emphasis ours unless otherwise noted.

amount of restoration agreed to restoration in excess of that paid for by the United States or chargeable to it [R. 180; Finding 19, R. 229]. It is respectfully submitted that there is no word of testimony in the record or concession of the parties to support these findings by the learned trial judge. True, counsel for Lebenbaum in arguing that the Court should not allow Gawzners payment in full for the undisputed value of the unleased area contended that restoration had been made in full and, therefore, there was not enough money left to pay Gawzners in full for the unleased area and pay in full for the leased area. Contentions of counsel, however, are not evidence. Lebenbaum stipulated the exact amount for restoration and to the detailed amounts thereof [R. 356 to 362]. We refer this Honorable Court to the exact language of the stipulation. At the conclusion of the reading into the record of the detailed figures counsel for Lebenbaum stipulated the figures were correct and the stipulated items [R. 362]. We are at a loss to understand why Lebenbaum in his brief is now attempting to renounce his stipulation made at the trial.

2. The Condemnation Clause Is Not Limited to Particular Condemnors, but Includes the State of California; County of Santa Barbara or Any Other Public Body for Highway or Other Public Purpose.

In view of the concession made in the Answering Brief (L.A.B. 7) and the concession in Lebenbaum's Opening Brief on his own appeal (p. 32) that the United States is a *public body* and instant proceedings were for a *public purpose,* we submit that the Concise Abstract was not only *accurate* but *fair.* Immaterial language not involved in the cause was eliminated and the eliminations properly indicated.

3. **We Again Assert Lebenbaum Made Only Limited Restoration of the Premises.**

4. **We Again Assert Gawzners Completed the Restoration of All of the Property and the Repair and Replacement of the Furniture and Equipment.**

We shall treat criticisms 3 and 4 together. We realize that one of present counsel for Lebenbaum has but recently been associated and that may account for the unwarranted assertions in Lebenbaum's Answering Brief (p. 3) that the statements in the Concise Abstract are untrue.

The following statements are made in Lebenbaum's Answering Brief (L.A.B. 3):

> "3. In the first complete paragraph on page 4 of their opening brief, Gawzners state that 'Lebenbaum made only limited restoration of the premises.' Such statement is not true and there is no supporting evidence in the record!"
>
> "4. In the paragraph next following, Gawzners state 'and Gawzners completed the restoration of all of the property and the repair and replacement of furniture and equipment.' Such statement is not true and there is no supporting evidence in the record!"

It is most regrettable that this Honorable Court should be called upon to determine the truth of statements of fact made by counsel before this Court. However, we feel that a flat assertion that we have made a misstatement of fact cannot be ignored.

Lebenbaum never contended that he had expended more than approximately $18,000 for restoration. (This does not appear in the printed portion of the record but does

appear in the Reporter's Transcript of April 25, 1947, pages 7 and 29.) Gawzners contended that many of the items claimed by Lebenbaum for restoration were actually maintenance charges after the hotel had been turned back to him [Reporter's Transcript April 25, 1947, pages 7 and 8 and May 12, 1947, pages 5 to 18]. Reference to this appears in the Court's Memorandum of Conclusions [R. 163-164].

In the Court's Memorandum of Conclusions [R. 105] reference is made to a statement appearing in a brief filed in the trial court January 2, 1947, by counsel for Gawzners in which it was claimed that though Lebenbaum had then been in possession of the hotel for six months after the United States' use had terminated, restoration had been made only in part [R. 146]. The Court did not note a contradiction of the statement.

Again in the Memorandum of Conclusions at a pre-trial hearing held January 17, 1947 [R. 148] counsel for Lebenbaum stated the estimate for restoration by his client was $60,000 [R. 151]. Counsel for Gawzners stated the amount estimated by his client was over $80,000 [R. 151].

At a further pre-trial hearing held February 28, 1947 [R. 151], counsel for Lebenbaum stated said defendant had expended $17,000 for restoration since taking possession of the premises [R. 152]. Counsel for Gawzners stated there would be a dispute whether all this amount had been spent for restoration [R. 152].

On March 19, 1947, the second day of the trial between Gawzners and Lebenbaum it was stipulated the portion of the award "that should be allocated to restoration, repair and replacement of the property condemned, both real

and personal, is the sum of $91,296" [R. 154 and 356]. Following this stipulation as to the amount of restoration there were many arguments and contentions made as to whether Lebenbaum should get this entire sum, whether Gawzners should get the entire sum, whether it should be impounded to be subject to joint control, whether it should be expended under the supervision of an interior decorator to be chosen by both parties or what should be done with the funds [R. 168, 169, and Reporter's Transcripts of April 25, 1947 and May 12, 1947].

On May 12, 1947, counsel for Lebenbaum agreed to turn the restoration fund over to Gawzners and *permit them to make restoration* provided Lebenbaum should be paid the sum of $18,000 plus the sum of $2,000 in the restoration fund established by the lease [R. 170]. On June 6, 1947, the parties presented a Stipulation dated June 5, 1947, to the Court [R. 170 and 435]. This Stipulation provided for the payment of the sum of $91,296 allocated to restoration, $10,500 to Lebenbaum and $80,796 to Gawzners [R. 98-104]. That the restoration had not then been completed was recognized by comments of the trial court and by counsel for both Lebenbaum and Gawzners [R. 436].

Having stipulated that $91,296 was the amount to be allocated for restoration, having never claimed to have spent more than approximately $18,000 for restoration, much of which was disputed by Gawzners, and having accepted $10,500 and waived any further claim to the resto-

ration fund [R. 101], we submit there is ample support in the record for the statement that Lebenbaum made only limited restoration of the premises.

The final refutation of the flat assertions of untruth imputed to Gawzners in their Opening Brief is found in an agreement executed by Lebenbaum and Gawzners in reference to such restoration contemporaneously with the Stipulation of June 5, 1947. This agreement was not filed and is not part of the record but we have printed it as an appendix to this brief (Appendix 1).

We regret the extent of this portion of the brief and crave this Honorable Court's indulgence. We refrain from going further outside this record and attempting to cover disputes which have occurred between the parties subsequent to the issues framed in this case and which may or may not be the subject of future litigation between the parties in some other court, even though Lebenbaum has referred to the same (L.A.B. 4). We attempted to have the trial court assume jurisdiction of one of these issues [Paragraphs IV, V and XX of Cross-Complaint of Gawzners, R. 78]. The trial court refused and struck these paragraphs [R. 353]. It was contended in Gawzners' Opening Brief that this was error (G.O.B. 48).

Incidentally, it will be noted that it was alleged in Paragraph XXI of the Cross-Complaint that Lebenbaum had failed to restore the premises [R. 79]. This paragraph was also stricken by the trial court [R. 353].

ARGUMENT.

I.

The District Court Erred in Declaring That the Condemnation Clause of the Lease Did Not Apply to the Within Litigation Because Lebenbaum Concedes a Condemnation Clause May Forfeit a Tenant's Right to an Award and That the United States Is a Public Body and the Within Action Is for a Public Purpose.

We again call the Court's attention to the concession made by Lebenbaum in reference to the condemnation clause. We shall re-quote that portion of the statement which includes the admissions.

> "Summarizing, we do not dispute that a general condemnation clause may result in a forfeiture of a tenant's right to a condemnation award. We do not dispute that the term 'other public body' may be used to include the United States or that it is a 'public body.' We do not dispute that the instant case involves an eminent domain proceeding for 'a public purpose.' * * *" (L.A.B. 7).

We shall now set forth the pertinent parts of the condemnation clause of the lease, which we contend are controlling [R. 291].

> "* * * In the event the State of California or the County of Santa Barbara or *any other public body* shall by condemnation acquire any additional portion of said leased premises for highway or *other public purpose,* the amount of the award in any such con-

demnation suit shall belong solely to the Lessors, * * * Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other." (Italics ours.)

We will now restate the condemnation clause by changing the italized words in the quotation by inserting in lieu thereof the appropriate words in accordance with the concession made by Lebenbaum in his Answering Brief, just above quoted, putting the changes also in italics.

"* * * In the event the State of California or the County of Santa Barbara or *The United States of America* shall by condemnation acquire any additional portion of said leased premises for highway or *Redistribution Station and Related Military Purposes for a term of years commencing July 10, 1944, and ending June 1, 1946,** the amount of the award in any such condemnation suit shall belong solely to the Lessors, * * * Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other." (Italics ours.)

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*[Third Amended Complaint, Paragraphs VII, IX and XII, R. 39, 40 and 42.]

When the concession made by Lebenbaum is spelled into the condemnation clause as we have just done, the answer appears not only simple but obvious. Yet in spite of that simplicity, Lebenbaum still contends that the additional words in the condemnation clause requiring Lessors to pay any and all assessments levied in any such condemnation proceeding require this Court to say the condemnation clause does not apply to the within case. It is argued that the condemnation clause applies only to one in which *assessments were levied* (L.A.B. 6).

If this argument is carried to its logical conclusion, the condemnation clause would not even apply to a taking by the State of California for a highway unless an assessment were levied.

If the condemnation clause requires the payment of the award to Gawzners, it also requires a decision that the lease was cancelled by the giving of Notice of Cancellation by Gawzners to Lebenbaum [R. 305-309].

We submit that if the concession made by Lebenbaum in his Answering Brief had been made at the pre-trial hearing, the decision of the late Honorable Harry A. Hollzer would have been different. (*United States v. 21 Acres of Land,* 61 Fed. Supp. 268.)

II.

That the District Court Erred in the Distribution of the Award Is Conceded by Lebenbaum and the Distribution of the Award Upon Some Ratio of Reasonable Rental Value to Gawzners and Prospective Profits to Lebenbaum Is Also Admitted by Failure to Answer the Contentions Advanced by Gawzners.

Lebenbaum *specifically* admits that the District Court erred in the distribution of the award (L.A.B. 10). Lebenbaum may as well have specifically admitted the Court erred in admitting testimony of the prospective profits of Lebenbaum and using such testimony as a basis for apportioning a part of the award to Lebenbaum. No attempt is made to answer the many cases cited in Gawzners' Opening Brief that such procedure is error.

Lebenbaum again reasserts that the error of the Court consisted in failing to distribute the entire balance of the award to him. *Pasadena v. Porter,* 201 Cal. 381, 257 Pac. 526, and *Gluck v. Baltimore,* 81 Md. 315, 32 Atl. 515 are again cited. The fundamental difference of fact in those cases and the case at bar render them useless as authority.

In *Pasadena v. Porter, supra,* a portion of the leased premises was being acquired for a street. The court held the tenant must continue to pay the rent called for by the lease until the end of the term without reduction for the space lost and, therefore, should collect the equivalent of that rent from the condemning body.

By quoting language from those cases, applicable to the facts of those cases, Lebenbaum is here seeking to obtain the entire award. If he is not given the entire award, he claims the Court cannot award Gawzners more than $1500 per month (See L.O.B. 20 and 55).

The facts in the case at bar are entirely different from the *Porter* and *Gluck* cases.

In the case at bar Lebenbaum was paying $5,000 per month in the six months he ran the hotel [R. 434]. Throughout the brief Lebenbaum intimates he is still *obligated* to pay rent to Gawzners for the term the United States had the premises. Lebenbaum does not state how much rent, except as he intimates it should not exceed $1500 per month. Lebenbaum insists jurisdiction to fix the amount to be paid Gawzners for such period must be fixed by a *State Court* and not the District Court. Does he hope by such a decision that he can convince a *State Court* that if he has collected in excess of $100,000 in this litigation, he is obligated to pay but $34,000 to Gawzners? Does he hope that by having the matter determined by a State Court he can, because of the long delay incident to this litigation, escape payment of any rental for the period the government had the premises?

There must be some motive for the insistence that no jurisdiction was vested in the trial court to distribute the award to anyone but Lebenbaum. All of the facts that would enter into a State Court trial were submitted before the District Court in the case at bar.

As we have heretofore shown, the jurisdiction to distribute the award in the case at bar is vested in the District Court.

Hopkins v. McClure (C. C. A. 10th), 148 F. 2d 67;

United States v. 53.25 Acres of Land, 47 Fed. Supp. 887;

Oliver v. United States (C. C. A. 8th), 156 F. 2d 281;

Galvin v. Southern Hotel Corporation, 164 F. 2d 791.

The case of *John Hancock Mutual Life Insurance Company v. United States,* 155 F. 2d 977, is authority for the fact that the tenant cannot collect from the Government rent which he was not obligated to pay to the landlord when the lease had on bonus value. In the *John Hancock Mutual Life Insurance Company* case it was indicated that the government had paid the landlord direct for the rental of the premises.

In the case of *United States v. General Motors Corporation,* 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, it is clear from the concurring opinion that the tenant was continuing to pay the landlord the rent reserved in the lease.

On page 14 of Lebenbaum's Answering Brief it is again asserted that Lebenbaum did pay rent until Gawzner refused to accept further rent. *Lebenbaum has not yet paid any rent for the period the United States had possession of the property* [Finding 13, R. 226, Stipulation by counsel for Lebenbaum, R. 422]. There is no statement in the record that Lebenbaum ever tendered any

rent for the period the United States was in possession except to move the District Court to award to him the amount of the minimum rental from the funds in the Registry and that motion was made nearly a year and a half after the Government took possession [R. 7]. The only rent Lebenbaum ever tendered was for *the period subsequent to June 1, 1946, after possession of the premises had been returned to him by the United States* pursuant to order of Court and he had again started operating the hotel as such. We suggest the Court examine the portions of the record referred to by Lebenbaum to verify these statements [R. 226; F. 12, 13; 202; 83; 117; 348-349; 8 par. 1; 11-12].

Lebenbaum then refers to *Galvin v. Southern Hotel Corporation,* 164 F. 2d 791, upon which Gawzners rely, and particularly to the portion of that decision relating only to the cancellation of the lease for failure of the tenant to abide by the conditions of the lease subsequent to the property being returned by the government. However, Gawzners cited the *Galvin* case primarily as authority that the District Court had jurisdiction to apportion the award in the case at bar, *the apportionment to be made upon the basis of reasonable rental value to the landlord and bonus value to the tenant.*

Lebenbaum's contentions, that if Gawzners were awarded the reasonable rental value of the premises during the period the United States was in possession *in this action,* that Gawzners could again collect from Lebenbaum in a State Court, are unwarranted. If Gawzners collected the reasonable rental value of the premises in this case, they certainly would be unable to collect a second time in a State Court.

III.

The Court Erred in Admitting Evidence of Loss of Profits.

We submit that the cases cited by Gawzners in their Opening Brief (pp. 40 to 44, incl.) establish conclusively the rule of law that a defendant in a condemnation action cannot recover for loss of profits. It is respectfully submitted that the cases cited by Lebenbaum* (L.A.B. 19), do not authorize the recovery of profits. It will be remembered in the case at bar that evidence of past profits [L. Ex. A, R. 312] and prospective profits [L. Ex. B, R. 324] was the only evidence offered by Lebenbaum.

On page 20 in the second full paragraph of Lebenbaum's Answering Brief the statement is made "that the stipulated judgment against the Government *did not* include compensation for ordinary wear and tear [R. 55]." Lebenbaum's counsel contended in the District Court that the judgment against the government *did* include compensation for ordinary wear and tear [Reporter's Transcript April 25, 1947, page 16—see Appendix II].

**U. S. v. Miller,* 317 U. S. 369, 374-375, 87 L. Ed. 336, 342, 343; *Kimball Laundry v. U. S.,* L. Ed. Adv. Opin. 1420. *Cf. Brooklyn etc. v. N. Y.,* 139 F. 2d 1007, 1013; *Monongahela Nav. Co. v. U. S.,* 148 U. S. 312, 37 L. Ed. 463, 468; *Montana R. Co. v. Warren,* 137 U. S. 348, 352, 34 L. Ed. 681.

IV.

There Is No Evidence in the Record That the Court Fixed the Rental Value of the Unleased Area by Allowing Some Percentage Less Than the Market Value.

It is respectfully submitted that there is no evidence in the record to ascertain how the Court arrived at its judgment. Lebenbaum's counsel advised the trial court that he was unable to ascertain any factual basis for the judgment [R. 188]. In Lebenbaum's Opening Brief to this Court, at page 11, calculations were made of what *apparrently* the Court did but there is absolutely no evidence in the record to indicate that is *what* the Court did. In fact to make the calculations tie in with the testimony at all it was necessary for counsel to assume that the Court transposed the percentages (L.O.B. 12). By the time Lebenbaum's Answering Brief was filed counsel were convinced that the Court *did* what they first stated *could not be ascertained from the record* and later *assumed* might have been done.

V.

The Court Erred in Refusing Leave to File Portions of Gawzners' Proposed Cross-Complaint.

We again submit that the case of *Galvin v. Southern Hotel Corporation,* 164 F. 2d 791, is authority for the fact that the Court should have permitted Gawzners to file Paragraph IV, V, XX and XXI of the Cross-Complaint and Exhibit B attached thereto.

We are frank to say we do not see how Lebenbaum interprets the agreement of July 23, 1946, which was an agreement covering possession of the premises subsequent

to June 1, 1946, as a waiver of the jurisdiction of the trial court over issues occurring after the period of taking had expired. Incidentally, this agreement referred to by Lebenbaum is Exhibit B [R. 82] attached to the Cross-Complaint, which exhibit the Court refused to consider [R. 353].

Conclusion.

We again respectfully request that this Honorable Court should remand the cause to the District Court with instructions to enter judgment for Paul Gawzner and Irene Gawzner, cancelling the lease and directing that the balance of the funds in the Registry of the Court should be distributed to them:

a. Because the lease between the parties had been cancelled by the institution of the within eminent domain proceedings and the giving of the Notice of Cancellation by Gawzners to Lebenbaum;

b. Because the condemnation clause of the lease requires the payment of all awards in an eminent domain action to Gawzners; and

c. Because there was no bonus value in Lebenbaum's lease and, therefore, the remaining portion of the funds on deposit in the Registry of the Court is the stipulated compensation for the use of said premises by the United States for the term taken.

Respectfully submitted,

HILL, MORGAN & FARRER, and
STANLEY S. BURRILL,
By STANLEY S. BURRILL,

Attorneys for Appellants Paul Gawzner and Irene Gawzner.

APPENDIX I.

Agreement.

Whereas, Paul Gawzner and Irene Gawzner are the owners of those certain premises in the County of Santa Barbara, State of California, commonly known and referred to as Miramar Hotel and Bungalows; and

Whereas, the said Paul Gawzner and Irene Gawzner, as lessors, and Leo Lebenbaum, as lessee, made and entered into a lease dated December 15, 1943, of said Miramar Hotel and Bungalows, which said lease is hereby referred to for the particulars thereof; and

Whereas, on or about July 10, 1944, the United States of America filed an action in condemnation in the District Court of the United States in and for the Southern District of California, Central Division, entitled "United States of America, plaintiff, vs. 21 Acres of Land, more or less, in the County of Santa Barbara, etc., Paul Gawzner, *et al.*, defendants," being numbered therein 3752-W Civil, seeking to acquire the use and possession of said Miramar Hotel and Bungalows for a term of years, reference to which said action is hereby made for the particulars thereof; and

Whereas, the said United States of America and the said Paul Gawzner, Irene Gawzner and Leo Lebenbaum did on or about November 26, 1946, enter into a stipulation for the entry of an interlocutory judgment in said proceedings; and

Whereas, an Interlocutory Judgment in Condemnation was made and entered in said proceedings on or about November 26, 1946, reference to which said Judgment is made for the particulars thereof; and

Whereas, said Interlocutory Judgment fixed the just compensation to be paid by said United States of America for the taking of the term of years sought in said proceeding, together with all compensation to be paid as damages arising out of any failure or default upon the part of said United' States of America in performance of its obligation to restore such premises, at the sum of $205,000 and the said United States of America has deposited in the Registry of said Court the sum of $205,000 less the sum of $1,672.23, which latter sum was deemed to have been received by said Leo Lebenbaum upon account of any compensation found to be due him; and

Whereas, by said Interlocutory Judgment the Court retained jurisdiction to determine the amount of the interests of all parties who had appeared in said proceeding, or who might thereafter appear therein, if any, in and to said just compensation the same as though a jury had rendered a verdict in the amount of $205,000; and

Whereas, in the course or proceedings had between the said Paul Gawzner and Irene Gawzner, on the one hand, and Leo Lebenbaum, on the other hand, in said above referred to action in reference to their respective claims in and to said award, it was stipulated in open Court as follows:

"It is stipulated that the portion of the award made by the Judgment of November 26, 1946, in the within cause that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of $91,296.00.";

and

Whereas, the said Paul Gawzner and Irene Gawzner, on the one hand, and the said Leo Lebenbaum, on the other hand, have contended that they each have the right to the control and management of said restoration fund and there have been other divers disputes and contentions made by each of them in reference to said restoration fund; and

Whereas, it is the desire of said Paul Gawzner and Irene Gawzner, on the one hand, and the said Leo Lebenbaum, on the other hand, to settle their disputes in reference to said restoration fund:

Now, Therefore, in consideration of the premises and the mutual covenants herein contained, it is hereby agreed by and between the parties hereto as follows:

1. That the said Leo Lebenbaum has expended towards the restoration of said premises at least the sum of $10,500 and that said sum should be paid to him out of the funds on deposit in the Registry of said Court and that said sum of $10,500.00 should be charged against the said sum of $91,296.00.

2. That there should be paid to the said Leo Lebenbaum the sum of $1,116.19, being the amount on deposit with the County National Bank and Trust Company, Santa Barbara, California, which account was created pursuant to the provisions of Paragraph Seven of said lease dated December 15, 1943.

3. That the said Leo Lebenbaum shall be relieved of the requirement of depositing three per cent (3%) of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges and from the sale

of beer, wine and liquor, including soft drinks, as provided in Paragraph Seven of said lease dated December 15, 1943, from the date of July 10, 1944, to January 1, 1949.

4. That said Paul Gawzner and Irene Gawzner shall dismiss with prejudice that certain action entitled "Paul Gawzner and Irene Gawzner, plaintiffs, vs. Leo Lebenbaum, defendant," pending in the Superior Court of the State of California in and for the County of Santa Barbara and numbered 39,224, and shall cause to be released the Writ of Attachment issued in connection with said proceedings and in this connection the said Leo Lebenbaum hereby waives any claim of whatsoever nature, if any, arising out of the institution of said action No. 39,224 and the issuance of the Writ of Attachment in said action and consents that the bond filed in connection with said attachment may be exonerated.

5. That the said Leo Lebenbaum upon the payment to him of the amounts, provided in Paragraphs 1 and 2 hereof and in consideration of the waiver set forth in Paragraph 3 hereof, hereby waives any further claim to be paid any additional sum of money for any alleged restoration of said premises, whether to be repaid from said sum of $91,296.00, or otherwise, and further agrees that the provisions of Paragraphs 1, 2, 3 and 4 of this agreement constitute full compensation to him for any restoration or replacement which he may have done to the said premises known as the Miramar Hotel and Bungalows subsequent to June 1, 1946, the date upon which the said United States of America surrendered possession of said premises, and said Leo Lebenbaum further agrees that upon the payment to him of said sum of $10,500 out of the Registry of said United States District Court

that said payment shall constitute full compensation to him for any portion of the award made by the Judgment of November 26, 1946, that was allocated to the restoration, repair and replacement of the property condemned and he will waive any further claim to that portion of said award allocated to restoration of said premises.

6. That the balance of said sum of $91,296 that was allocated to the restoration, repair and replacement of the property condemned, both real and personal, after the payment to said Leo Lebenbaum of $10,500, to wit, the sum of $80,796 shall be paid to Paul Gawzner and Irene Gawzner out of the Registry of said United States District Court and that upon the payment of said sum of $80,796 to said Paul Gawzner and Irene Gawzner they hereby agree that said sum shall constitute full compensation to them for any portion of the award made by the Judgment of November 26, 1946, that was allocated to the restoration, repair and replacement of the property condemned, both real and personal, and they will waive any further claim to that portion of said award allocated to restoration of said premises.

7. That upon receipt of said sum of $80,796 said Paul Gawzner and Irene Gawzner shall deposit the same in a separate bank account, which shall be known as a rehabilitation or restoration account and shall expend said sum of money to accomplish the complete restoration, repair and replacement of said Miramar Hotel and Bungalows to the end that said Miramar Hotel and Bungalows shall be restored and repaired and furniture and furnishings replaced into at least as good condition as said premises were in on July 10, 1944.

That if after the completion of said restoration and replacement any balance of said sum of $80,796 is unexpended that the same shall be deposited in the bank account provided for by Paragraph Seven of said lease dated December 15, 1943, to be dealt with as provided by said Paragraph Seven.

8. That the said Paul Gawzner and Irene Gawzner shall be diligent in their efforts towards the restoration of said Miramar Hotel and Bungalows and the furniture and furnishings thereof, but shall have a period not to exceed ten (10) months from the date of the receipt of said sum of $80,796 within which to complete such restoration and said Leo Lebenbaum shall make available to said Paul Gawzner and Irene Gawzner at all times at lease two units or cottages during the period of restoration in order to permit said Paul Gawzner and Irene Gawzner to accomplish said restoration and shall also make available without charge the us of the building (constructed by the Army as a recreation room) during said period of restoration as a storage and workshop in connection with such restoration.

9. That the said Paul Gawzner and Irene Gawzner shall have absolute discretion in the expenditure of said sum of $80,796 so long as the same is used to restore and repair said Miramar Hotel and Bungalows and replace the furniture and furnishings thereof but they shall employ in a consulting capacity Verna Dunlevy, or some other interior decorator, and the fees and expenses of such interior decorator will be a proper charge against said rehabilitation or restoration account, except that the fees of such interior decorator shall not exceed $2,500 without the approval of all parties to this agreement.

If said sum of $80,796 is expended before said Miramar Hotel and Bungalows have been restored and repaired and the furniture and furnishings therein replaced to at least as good condition as they were in on July 10, 1944, the said Paul Gawzner and Irene Gawzner shall from their own funds complete the restoration and repair of said Miramar Hotel and Bungalows and the replacement of the furniture and furnishings thereof to at least as good condition as said premises were in on July 10, 1944.

10. That each month after said restoration is started said Paul Gawzner and Irene Gawzner shall render an account to Leo Lebenbaum of the funds expended during the previous month from said rehabilitation or restoration account and said Leo Lebenbaum shall be entitled, if he so desires, to audit the invoices and expenditures made from said funds to the end that said sum of $80,796 shall be expended only toward the repair and restoration of said premises or the replacement of furniture and furnishings therein.

11. That it shall be considered that the amounts paid or due to the Walter M. Ballard Corporation for their survey and other charges in connection with the restoration of said Miramar Hotel and Bungalows is a proper charge against said sum of $80,796, if the said Paul Gawzner and Irene Gawzner desire to charge the same thereto.

However, there shall be no charge to said rehabilitation or restoration account for any personal services rendered or personal expenditures made by said Paul Gawzner, Irene Gawzner or any members of their family.

Any furniture, furnishings purchased or other expenditures made by said Paul Gawzner and Irene Gawzner

shall be charged to said rehabilitation or restoration account at the cost thereof to said Paul Gawzner and Irene Gawzner.

12. The parties hereto shall cooperate in all reasonable ways to the end that said repairs, restoration and replacements shall be promptly and efficiently done with as little interference as possible to the operation of said hotel and said Paul Gawzner and Irene Gawzner shall not, so long as Leo Lebenbaum is entitled to the possession thereof, interfere with the management of said Miramar Hotel and Bungalows, except in so far as necessary in the restoration and repair of said premises and the replacement of the furniture and furnishings thereof.

13. Except as in this agreement provided to the contrary, this agreement is made without prejudice to the rights of any of the parties hereto to assert and maintain in any litigation any and all claims which they have heretofore advanced or may hereafter advance in said litigation and the payment of said funds or the acceptance thereof under the terms and conditions of this agreement shall not operate to estop the parties or either or them to assert any rights for which they have heretofore or may hereafter contend, nor shall the payment of said funds or the acceptance thereof be construed to be a relinquishment of any of the rights asserted by any of the parties to this agreement, save and except that his agreement shall be conclusive between the parties as to their rights to that portion of the award made in said action No. 3752-W Civil allocated pursuant to stipulation of the parties hereto to the restoration, repair and replacement of the property condemned in said action, both real and personal, which said portion of the award was by stipulation agreed to be the sum of $91,296.00.

Upon the said United States District Court ordering the payment from the Registry of said Court of said sum of $91,296.00 to the parties hereto, as provided by this agreement, the parties hereto waive any further contentions as to that portion of the award made by said Judgment of November 26, 1946, and agree that the same shall be controlled by the terms of this agreement.

14. There has heretofore been prepared a list of expenditures made by Lebenbaum in the restoration of the Miramar Hotel and Bungalows as per a computation made as of March 23, 1947. Said computation sets forth items rejected by Paul and Irene Gawzner and as to all such rejected items, Lebenbaum shall have the right and privilege of removing said items when the same have been replaced by Paul and Irene Gawzner in accordance with the provisions of this agreement.

15. Lebenbaum is hereby relieved of any obligations or liabilities for shortages in the inventory due to the occupation of the Miramar Hotel and Bungalows by the United States Government. Upon the completion of the rehabilitation as contemplated by this agreement, a new inventory of all furniture and equipment shall be made, and upon the acceptance of said inventory, the original inventory accepted by Lebenbaum at the time of the execution of the original lease shall be deemed and considered as superseded by the new inventory, and from and after said date, Lebenbaum shall be released of all obligations and liabilities for the original inventory, and shall thereafter be liable only for the items as set forth on the new inventory.

16. In carrying out the provisions of the rehabilitation as provided in this agreement, Paul and Irene Gawz-

ner shall not incur any liability in the name of Miramar Hotel and Bungalows, or any liability for which Lebenbaum could be held liable.

17. In the completion of the rehabilitation as provided in this agreement, all labor and material shall be of a quality and quantity at least equal or equivalent to that specified in the Ballard report.

18. Paul and Irene Gawzner hereby do assume and agree to pay all known obligations to Walter M. Ballard Corporation heretofore incurred by any of the parties hereto.

19. As a part of the rehabilitation, Paul and Irene Gawzner agree that they will remove the "recreation" building erected by the United States Government to a new location on the grounds of the Miramar Hotel, and when so removed, shall partition the same for use by the employees of the said hotel as living quarters.

20. Reference is hereby made to paragraph 8 above, and it is mutually understood and agreed that the two units or cottages to be made available to Paul and Irene Gawzner shall at all times be selected and designated by Lebenbaum.

In Witness Whereof, the parties hereto have hereunto set their hands this 5th day of June, 1947.

/s/ Leo Lebenbaum
Leo Lebenbaum

/s/ Paul Gawzner
Paul Gawzner

/s/ Irene Gawzner
Irene Gawzner.

APPENDIX II.

[Rep. Tr. p. 16, April 25, 1947.]

"Mr. Hearn: If your Honor please, I understand that to mean this, that the government had an obligation to restore such damage as it might do to the property over and above ordinary wear and tear and that that obligation to so restore is deemed compensated by this judgment. However, that does not mean that the item of ordinary wear and tear entered into the judgment at no place whatsoever. It really entered into the balance of the judgment over and above that item of damages, that is to say, had we litigated the subject of how much damage the government did to the premises, then ordinary wear and tear would have been included over that particular question, but, by the same token, as Mr. Burrill has said, it would have been included in the amount that was set up for rent. So that I understand the award that is now in the registry of the court includes a sum appropriate to ordinary wear and tear, probably under the heading of 'Rent.' Do you so understand it, Mr. Burrill?"